

OCT 25 1977

RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-222

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,
Petitioner,

vs.

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO
TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS
PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.;
COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.;
COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.;
COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,

*Respondents,**and*

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

PETITIONER'S REPLY BRIEF

JONATHAN S. GAYNIN
Counsel for Petitioner
225 Broadway
New York, N. Y. 10007
(212) 964-8181

Of Counsel:

VITO VINCENTI
VINCENTI & SCHICKLER

TABLE OF CONTENTS

	PAGE
PETITIONER'S REPLY BRIEF	1-9
Cases Cited	
Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2d Cir. 1975) cert. den. 423 U.S. 1052 (1976)	7
Gregonis v. Philadelphia & Reading C & I Co., 235 N.Y. 152, 139 N.E. 223 (1923)	6
Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947)	3, 5, 9
International Milling Co. v. Columbia Transportation Co., 292 U. S. 511 (1934)	3, 9
Irrigation and Industrial Development Corporation v. Indag, 37 N. Y. 2d 522; 337 N. E. 2d 749, 375 N.Y.S. 2d 296 (1975)	4, 5
Koster v. Lumberman's Mutual Casualty Co., 330 U.S. 518 (1947)	3, 5, 9
Missouri ex rel Southern Railroad Ry. Co. v. Mayfield, 340 U.S. 1 (1950)	6
Mollendo Equip. Co. v. Sekisan Trading Co., 7 A. D. 2d 750, 392 N.Y.S. 2d 427 (1st Dept. 1977)	4, 5
Mondue v. New York, N.H. & H.R. Co., 223 U.S. 1 (1911)	2
Norwood v. Kirkpatrick, 349 U.S. 29 (1955)	3, 9
Ortwein v. Schawb, 410 U.S. 656 (1973)	8
United States v. Kras, 409 U.S. 434 (1973)	8

	PAGE
Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956) cert. den. 352 U.S. 871 (1956)	7
William v. Green Bay & Western Railway Co., 326 U.S. 549 (1946)	3
Yerostathis v. A. Luisi, Ltd., 380 F.2d 377 (9th Cir. 1967)	7

United States Constitution Cited

Fourteenth Amendment	6
----------------------------	---

Portugal Constitution Cited

Articles 10, 82, 84, 86	5
-------------------------------	---

Rule Cited

New York Civil Practice Law:

R. 327	2-4, 8, 9
--------------	-----------

Other Authorities Cited

Barrett, The Doctrine of Forum Non Conveniens, 35 California L. Rev. 380 (1947)	4
Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Columbia L. Rev. (1929)	4
Jones, Forum Non Conveniens, 54 Texas L. Rev. 737 (1976)	4
Restatement, Second, Conflict of Laws, Comment f (Proposed Official Draft, Pt. 1. 1967):	
Sec. 84	4

	PAGE
R. Weintraub, Commentary on the Conflict of Laws, 157 (1971)	4
Ryan & Berger, Forum Non Conveniens in California, 1 Pacific L.J. 532 (1970)	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-222

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,
Petitioner,

vs.

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO
TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS
PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.;
COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.;
COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.;
COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,
Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Intervenor.

PETITIONER'S REPLY BRIEF

There is no more fundamental interest than the right of an individual to be able to seek redress for wrongs committed to him in a court with proper jurisdiction.

Mondue v. New York, N.H. & H.R. Co., 223 U.S. 1, 58 (1911). This right is basic to our judicial system and before that to the common law which arose in the English judicial system. Petitioner is being denied this fundamental right through the application of Rule 327 of the Civil Practice Law and Rules of the State of New York. Petitioner, a long standing resident of the State of New York, sought to avail himself of the use of the courts of his state to recover for wrongful acts committed against him by Respondents.

In spite of the fact that Petitioner was a resident, that both personal* and quasi in rem jurisdiction was obtained over Respondents by personal service of the summons and complaint and the court ordered attachment within the State of New York of obligations due Respondents, that the causes of action against Respondents arose out of business being conducted by Respondents within the State of New York, and New York law would apply, the Court below dismissed Petitioner's complaint before a hearing and the giving of evidence could take place upon the ground of forum non conveniens. Moreover, Petitioner is not just being forced to seek redress for damages in another state which is subject to the guarantees of a fair trial and due process under this country's Constitution, but is being required to travel 6,000 miles to a foreign jurisdiction where, at best, it is *questionable* Petitioner can obtain a fair trial and receive due process.

Petitioner does not deny the power of a court to utilize the doctrine of forum non conveniens in proper circumstances. Rather, Petitioner contends that the New York Courts, in applying the New York Statutes in this case, have acted arbitrarily and in violation of Petitioner's

* See footnote on page 16 of Petition for Writ of Certiorari.

rights under the due process clause of the United States Constitution. The precepts for the application of the doctrine have been laid out in the bench mark decisions of this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Koster v. Lumberman's Mutual Casualty Co.*, 330 U.S. 518 (1947). The decision in *Gulf Oil v. Gilbert*, *supra*, states that the doctrine of inconvenient forum should be applied only in "exceptional circumstances". The record is clear that no exceptional circumstances exist. Indeed, the application of Rule 327 by the Court below is contrary to all of the principles set forth by this Court in its prior decisions concerning the application of forum non conveniens. *International Milling Co. v. Columbia Transportation Co.*, 292 U.S. 511 (1934); *Williams v. Green Bay & Western Railway Co.*, 326 U.S. 549 (1946); *Gulf Oil Corp. v. Gilbert*, *supra*; *Koster v. Lumberman's Mutual Casualty Co.*, *supra*; *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

The principles outlined by this Court have not been followed and the Petitioner is being denied due process. This Court apply stated in *Gulf Oil Corp. v. Gilbert*, *supra*, (at p. 508 of 330 U.S.):

"But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed".

The mere inconvenience of the defendant is insufficient.

"[E]ven where the cause is transitory and the plaintiff a resident of the forum state, the convenience to the Court would seem to be outweighed by its duty to entertain actions by it of citizens of the state of which the court is in arm." *Koster v. Lumberman's Mutual Casualty Co.*, *supra*, 535.

The Petitioner is a long time resident of the State of New York. The doctrine of forum non conveniens has uniformly never been applied by a state court to its own resident and taxpayer prior to its unique application by the courts of New York. See Restatement, Second, Conflict of Laws §84, Comment f (Proposed Official Draft, Pt. I. 1967); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Columbia L. Rev. (1929); Barrett, *The Doctrine of Forum Non Conveniens*, 35 California L. Rev. 380 (1947); Ryan & Berger, *Forum Non Conveniens in California*, 1 Pacific L.J. 532 (1970); R. Weintraub, *Commentary on the Conflict of Laws*, 157 (1971); Jones, *Forum Non Conveniens*, 54 Texas L. Rev. 737 (1976). Respondents and the Intervenor fail to refer this Court to a single decision where a state court has applied forum non conveniens against its own resident-plaintiff prior to the unprecedented decisions of the New York Courts. With the adoption of Rule 327 of the New York Civil Practice Law and Rules, the Courts of New York have now, apparently, determined to summarily dismiss actions by its residents upon this ground. [See *Irrigation and Industrial Development Corporation v. Indag*, 37 N. Y. 2d 522; 337 N. E. 2d 749, 375 N.Y.S. 2d 296 (1975); *Mollendo Equip. Co. v. Sekisan Trading Co.*, 7 A. D. 2d 750, 392 N.Y.S. 2d 427 (1st Dept. 1977)].

The fact of Petitioner's residency in New York, however, does not stand alone as the basis for his contention as to constitutional repugnancy. This lawsuit involves entirely the relationship between Petitioner as exclusive representative for the sale of Respondents' products in the United States, and the definition of that relationship. One cause of action is for nothing more than commissions earned for sales in the United States and Canada (2).*

* Figures in parentheses refer to the record on appeal.

All Respondents' sales were conducted through Petitioner, whose business has at all times been located in New York (1, 81). The bulk of the suit involves the right of Respondents to sell to customers located throughout the United States cultivated by Petitioner (2, 81, 158). Respondents' business in the United States involved their participating in arbitrations and hearings in various tribunals in the United States (145-147). At present, they maintain an action integrally related to this one against a corporation owned by Petitioner in the Federal District Court, literally across the street from the State Court which dismissed this action (140-145). Respondents do the overwhelming bulk of their business internationally and more than one-third of it has been done in the United States through Petitioner's business in New York (158). The law applicable is that of the State of New York. The central witnesses are primarily located in the State of New York. None of these factors were present in the *Irrigation* and *Mollendo* cases, *supra*. Accordingly, apart from the novelty of the application by the Courts of the State of New York of the doctrine in the case of a plaintiff resident, in this action those Courts have applied it in a situation and in such a manner as is at odds with even their most recent decisions under the Statute and clearly transgresses the principles laid down by this Court in the *Gulf Oil* and *Koster* cases, *supra*.

Moreover, not only is it questionable that Petitioner can obtain a fair trial and due process in the foreign jurisdiction but there is also question as to the enforceability of any judgment obtained in that foreign jurisdiction, since the Constitution of Portugal expressly favors Respondents and authorizes nationalization and expropriation in favor of Respondents (see Petition, pp. 10-11, Articles 10, 82, 84 and 86 of the Portuguese Constitution).

Petitioner respectfully submits that it is now appropriate and urgent for this Court to determine the constitutional parameters of the application of the doctrine and this case uniquely raises this issue. Certainly dismissal of an action of a plaintiff resident on grounds of the doctrine directly raises the question of its effect upon the Fourteenth Amendment of the United States Constitution. [See *Gregonis v. Philadelphia & Reading C & I Co.*, 235 N.Y. 152, 139 N.E. 223 (1923)].

Respondent brief is of no substance. It merely sets forth procedural arguments as to why this Court should not entertain certiorari. These procedural arguments, even if true, should not be a ground for a denial of certiorari where such a basic right is to access to the courts of one's own jurisdiction is at issue. Respondent brief fails to deal with any of the substantive aspects of the petition.

The brief of the Intervenor is misleading and misapplies the decisions referred therein. It also fails to respond to any of the substantial questions raised by the petition. It is asserted by the Intervenor in his brief (at p. 4) that the decision of the Court below is not subject to review. Intervenor then refers to *Missouri ex rel Southern Railroad Ry. Co. v. Mayfield*, 340 U.S. 1 (1950). The Intervenor misleads this Court as to the applicability of the *Missouri* case and misquotes from it. What this Court said in *Missouri* is that a state court may prefer access to its courts by its residents over non-residents. Specifically, this Court said in *Missouri* the following (at p. 4 of 340 U.S.):

"But if a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all non-residents, whether its own citizens or those of other States, is a choice within its own control".

This Court then went on to say that such a choice of its residents over non-residents is not open to review here. The word "choice" refers to the state court's preference of its own residents over non-residents. The Intervenor has extended this to apply to all cases of forum non conveniens including the denial of access of a state court of its own resident plaintiff.

The other decisions referred to by the Intervenor in his brief are not applicable to the questions raised on this petition. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975) cert. den. 423 U.S. 1052 (1976); *Yero-stathis v. A. Luisi, Ltd.*, 380 F.2d 377 (9th Cir. 1967); *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956) cert. den. 352 U.S. 871 (1956) referred to by the Intervenor in his brief (at p. 4) are not in point. *Fitzgerald* was brought under the Federal Maritime laws by the estate of a German national seeking recovery because of an accident at sea between a German ship and a Panamanian ship. There was already pending in the courts of England substantial litigation between the German ship and the Panamanian ship over this accident. There is nothing in the decision to indicate that the plaintiff was a long standing resident of the jurisdiction of the Court, if at all. The Court applied forum non conveniens because of the existing litigation in the courts of England. Moreover, although it is not expressly stated in the decision, since the plaintiff is not a citizen of this country, the Federal Court would not have had jurisdiction except by reason of the Federal Maritime Statute. Likewise, *Yero-stathis* was an admiralty case involving a non-resident foreign national and a foreign ship under the Federal Maritime laws.

In *Vanity Fair* a special situation arose. It involved a claim by an American corporation with respect to the en-

forcement of a trademark infringement in a foreign jurisdiction. The question was really one of jurisdiction and whether the Federal Court could enjoin a foreign national as to activities in a foreign jurisdiction. Because of this the Federal Court dismissed the complaint holding that it was more appropriate for plaintiff to seek his injunction in the foreign jurisdiction where it could be enforced. At bar, Petitioner is seeking recovery for acts committed within the State of New York and there is a court ordered attachment in the sum of \$122,000 from which judgment could be satisfied. Incidentally, if Respondents prevail, the attachment will be vacated and Respondents will receive the \$122,000. No provision was made by the Court below to maintain this fund and it is very likely that once the attachment is vacated, Petitioner will never be able to satisfy any judgment he could obtain.

Intervenor's brief fails to set forth a single decision where there was the dismissal upon facts similar to this action, involving a resident, where the Court had personal and quasi in rem jurisdiction, where the cause of action arose in the jurisdiction and where the law of the forum state was to be applied.

United States v. Kras, 409 U.S. 434 (1973); *Ortwein v. Schawb*, 410 U.S. 656 (1973) have no applicability here. Those cases involved plaintiffs who could not afford to pay fees appropriately required by the courts. No such situation exists here. The Petitioner has paid any applicable court fees and is willing to pay all future court fees to prosecute his claims against Respondents. Petitioner is not contending that under no circumstances can a court deny access by reason of necessary fees to its residents. What Petitioner contends is that the application of Rule 327 and the doctrine of forum non conveniens by the Court below is unconstitutional.

It is asserted in Intervenor's brief (at p. 5) that the Petitioner is seeking to have this Court review a factual determination of a state court. This is not the case. What Petitioner seeks is a review of the application of Rule 327 and forum non conveniens by the Court below because it violates the tenets laid down by this Court in *International Milling Co. v. Columbia Transportation Co.*, *supra*; *Gulf Oil Corp. v. Gilbert*, *supra*; *Koster v. Lumberman's Mutual Casualty Co.*, *supra*; *Norwood v. Kirkpatrick*, *supra*.

The petition has raised substantial questions which should concern this Court. As a result of the application of Rule 327, the Courts of the State of New York are arbitrarily denying access to its residents on an alarming basis. In most cases, access is being denied merely because the resident was doing business with a foreign national without regard as to the principles set down by this Court and whether the resident can obtain a fair trial and due process.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN S. GAYNIN
Counsel for Petitioner
225 Broadway
New York, N. Y. 10007
(212) 964-8181

Of Counsel:

VITO VINCENTI
VINCENTI & SCHICKLER